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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Estate of DAVID HENRY GILL,
Deceased.

JONATHAN R. GILL et al.,

Plaintiffs and Appellants,

v.

BRIAN GILL,

Defendant and Respondent.

H036291
(Monterey County
Super. Ct. No. MP11751)

This appeal concerns the unfortunate scenario in which family members became embroiled in controversy over alleged misconduct in the management of the assets of a revocable family trust. David Henry Gill, the trustor of an eponymous revocable trust, passed away in 1990, five months after its creation. He was survived by his widow and six children. One of the trustor's children, Brian,¹ an attorney experienced in trusts and estates matters, served as the successor cotrustee for over 17 years after his father's

¹ We refer to the parties herein by their forenames. We do so as a matter of convenience and mean no disrespect in omitting their shared surnames.

death.² In 2008, after Brian resigned and two brothers, Jonathan and Jason (petitioners), succeeded him as cotrustees, they filed proceedings on behalf of the trust against Brian to recover trust funds allegedly taken by him without justification and allegedly excessive payments he made to his wife, Kim Gill, for interior design and project management services she rendered to the trust.

After a four-day trial, the court rejected petitioners' claims. It held that Brian had not improperly diverted trust funds to himself and the compensation he had paid to Kim for her services was reasonable. Thereafter, the court awarded Brian \$213,274.18 in attorney fees and costs (the fee order), a sum that was about \$92,000 less than the sum he had requested.

Petitioners challenge the court's rejection of their claims against Brian, arguing that the evidence established that he breached his fiduciary duty to the trust by, *inter alia*, making unauthorized payments to himself and by paying unreasonable compensation to Kim. Petitioners also claim that the court abused its discretion in awarding Brian his attorney fees and costs. We conclude that the court did not err in rejecting petitioners' claims and did not abuse its discretion in granting Brian's motion for attorney fees and costs. Accordingly, we will affirm the judgment.

PROCEDURAL BACKGROUND

In November 2008, Jonathan and Jason, as successor cotrustees of the David Henry Gill Revocable Trust, dated March 11, 1990, filed a petition to recover funds from Brian that he had disbursed from the trust. Petitioners alleged that between 1990 and 2008, Brian had improperly disbursed trust funds in the form of unexplained payments, undocumented loans, legal fees, and payments for personal expenses. The claim, made

² The trustor's widow served as cotrustee with Brian from 1990 to 2006. Her conduct as cotrustee is not a subject of this litigation.

pursuant to Probate Code section 16440,³ was for approximately \$55,415 in principal plus approximately \$59,000 in interest. Petitioners alleged further that Brian hired Kim to oversee the renovation of a home on Pelican Road in Pebble Beach that was a trust asset (Pebble Beach Project or Project), and that he overpaid her for those services by approximately \$75,000. Brian opposed the petition.

In a four-day trial on the petition in June 2010, the court heard testimony from numerous witnesses and received voluminous exhibits. The court thereafter issued a tentative decision and proposed statement of decision in Brian's favor.⁴ After petitioners filed objections to the ruling and requested a statement of decision, and Brian formally responded to those filings. The court overruled the objections and ordered that certain responses contained in Brian's filing be added to the findings previously made by the court and incorporated into a final statement of decision. The court signed the final statement of decision on September 3, 2010.

In the meantime, after the court's initial ruling, Brian filed a motion for attorney fees, seeking a total of approximately \$305,000.00 in fees and costs. Petitioners opposed the motion. The court found that Brian, as the prevailing party, was entitled to reasonable attorney fees and costs attributable to the proceeding on the petition. It ruled that 70 percent of the claimed amount was reasonable, awarding Brian \$213,274.18.⁵

³ Further statutory references are to the Probate Code unless otherwise stated.

⁴ The court's ruling was originally captioned "Ruling and Statement of Decision." (Capitalization omitted.) By court order, the document was renamed " 'Tentative Decision and Proposed Statement of Decision.' "

⁵ The court indicated further in its fee order that "[n]o part of this amount is to be paid from the trust in such a way as to diminish [Brian's] interest in the trust or its disbursements."

A judgment was entered in favor of Brian on September 3, 2010. Appellants filed a timely notice of appeal. The judgment here is appealable. (See Code Civ. Proc., § 904.1, subd. (a)(10); §§ 1304, subd. (a), 17200, subd. (b)(12).)

DISCUSSION

I. *Breach of Fiduciary Duty*

A. *Proceedings against Trustee and Standard of Review*

Section 16420, subdivision (a) provides in relevant part: “If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may commence a proceeding for any of the following purposes that is appropriate: [¶] . . . [¶] (3) To compel the trustee to redress a breach of trust by payment of money or otherwise.” The measure of liability for a trustee’s breach, as defined in section 16440, subdivision (a) is described as follows: “If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. [¶] (2) Any profit made by the trustee through the breach of trust, with interest. [¶] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.” And “[t]he remedies of a beneficiary against the trustee are exclusively in equity.” (§ 16421.)

The Probate Code provides that the court, in its discretion, may excuse a trustee: “If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.” (§ 16440, subd. (b) (16440(b)); see also *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 906.) The court may

also excuse a trustee from the imposition of liability for interest if the trustee has acted in good faith and reasonably. (§ 16441, subd. (b) (16441(b)).)⁶

“In order to plead a cause of action for breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action. [Citation.] The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee’s failure to perform it; the burden then shifts to the trustee to justify its actions. [Citation.]” (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517.)

A disputed factual issue that has been resolved by the trial court is reviewed on appeal under the substantial evidence standard. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) “In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. . . . [W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. . . .” (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) It is the appellant’s burden to establish that the judgment is not supported by substantial evidence. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1011.)

It is plain from our review of the trial transcript that there were significant factual disputes relating to petitioners’ claim that Brian breached his fiduciary duties.

⁶ Sections 9601, subdivision (b) and 9602, subdivision (b), respectively—paralleling sections 16440(b) and 16441(b)—authorize the court in its discretion to relieve in whole or in part a personal representative acting reasonably and in good faith of liability for damages and interest otherwise chargeable for fiduciary duty breaches.

Accordingly, the substantial evidence standard of review is applicable here to the court's determination as to petitioners' claims of breach of fiduciary duty. (*Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603 [trial court's determination of whether trustee breached duties reviewed under substantial evidence standard]; *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 472 [no substantial evidence supporting court's surcharge order where sale of property at a loss was not the fault of personal representative]; *In re Estate of Talbot* (1956) 141 Cal.App.2d 309, 319-320 [court's finding that trustee failed to exercise independent judgment in investment decisions supported by substantial evidence].)⁷

As noted, the Probate Code authorizes the trial court to excuse a trustee acting reasonably and in good faith from liability in whole or in part for breaches of fiduciary duty. Under both sections 16440(b) and 16441(b), the court may relieve the trustee "in its discretion . . . if it would be equitable to do so." Obviously, to the extent the court here relied on either section to excuse Brian from liability he would have otherwise incurred, such a ruling would be reviewed for abuse of discretion. Under this standard, " '[d]iscretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its

⁷ The court's decision as to which of three measures of liability to impose under section 16440, subdivision (a) is a matter reviewed under an abuse of discretion standard. (*Uzyel v. Kadisha, supra*, 188 Cal.App.4th at p. 911.) Here, however, the court did not exercise its discretion in selecting one of the three remedies under section 16440, subdivision (a); therefore, the holding in *Uzyel* is inapplicable on the standard of review issue.

opinion and thereby divest the trial court of its discretionary power.’ [Citations.]”
(*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

B. *Petitioners’ Claims and Court’s Decision*

Petitioners sought an order that Brian return monies to the trust that were improperly paid to himself and to his spouse. It was alleged in the petition that Brian should be required to return to the trust the principal amount of \$55,416.16 in improper payments he made to himself, along with about \$59,000 in interest. This claim involved four categories, namely, (1) payments for which the purpose indicated in the trust’s accounting records were unspecified (\$19,925), (2) payments which were classified as loans for which there were no promissory notes or evidence of repayment (\$7,000), (3) payments for personal expenses (\$1,823.66), and (4) payments for alleged legal fees for which there were no corresponding invoices (\$26,667.50). The second component of the claim for money in the petition concerned payments to Kim for work performed on the Project. Petitioners sought an order that Brian repay the trust for the portion of the payments to Kim that was unreasonable, i.e., \$75,000.

The trial brief and the argument of petitioners’ counsel at trial tracked the claims of the petition that Brian return monies improperly paid to himself and excessive payments to his wife. Because of documents Brian produced after the filing of the petition relating to some of the questioned payments, however, the principal amount sought for the recovery of allegedly improper payments to Brian was reduced at trial by petitioners by more than one-half—from \$55,416.16 to \$24,748.66.

The court concluded after trial that the evidence did not “support the claim that Brian Gill took trust funds to which he was not entitled during the seventeen years of his trust administration. In fact, the evidence establishes that during that period the fees he took were far less that he was entitled to claim.” The court held further that the evidence demonstrated that the compensation Kim charged and was paid for the Project was

reasonable; the rate of \$100 per hour that she charged was reasonable and, in fact, she billed a number of her hours at a discounted hourly rate of \$40.

C. *Petitioners' Contentions on Appeal*

Petitioners challenge the fee order, claiming that the court abused its discretion in awarding Brian his attorney fees and costs. Other challenges petitioners assert in their appellate briefs, however, are less apparent. The opening brief is replete with generalized statements—such as using “reversible error” as a mantra without substance to support the assertions—which do not assist us in determining petitioners’ specific legal contentions. And petitioners fail to identify or apply the standard or standards governing our review of any generalized claims of trial court error.

We glean from the three sections of argument in the opening brief unrelated to the fee order that petitioners claim the trial court erred in rejecting their position that Brian breached his fiduciary duties as trustee in several respects. These claimed breaches, as discussed in petitioners’ briefs, include the two claims asserted in the petition (alleged improper payments to Brian and allegedly excessive compensation paid to Kim) as well as other, unpleaded matters. We also deduce from their briefs that petitioners contend the trial court erred by (1) excusing the claimed fiduciary duty breaches by finding that Brian acted reasonably and in good faith, and (2) purportedly granting Brian an offset for fees that he had not previously charged the trust and which he had therefore waived.

“It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ‘ “ ‘all intendments and presumptions are indulged in favor of its correctness.’ ” [Citation.]’ [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. ‘Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.’ [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the

presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. omitted.) Consonant with these principles, we have previously held that the failure to provide argument or authority in support of a contention on appeal will result in the claim being deemed forfeited, because appellate courts are “not bound to develop appellants’ arguments for them.” (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830; see also *Associated Builders and Contractors, Inc. v. San Francisco Airports* (1999) 21 Cal.4th 352, 366, fn. 2 [appellate contention without supporting analysis or argument is deemed not raised]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [issue to which appellant makes only “passing reference” in brief deemed forfeited].)

Here, it is apparent that, aside from the challenge to the fee order, petitioners have failed in their appellate briefs to adequately identify and develop their claims of error. Petitioners’ repeated claims that the evidence demonstrated multiple “breaches of trust” by Brian as trustee, without specific argument and citation to the record, do not appear to be a sufficient discussion to preserve the contentions. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be supported by “argument and, if possible, by citation of authority”]; see also *Utility Consumers’ Action Network v. Public Utilities Com’n of California* (2010) 187 Cal.App.4th 688, 698 [argument deemed waived for failure to support claim of error with argument, or support it with necessary record citations].) We are not required to make arguments for petitioners or “speculate about which issues counsel intend to raise.” (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1831, fn. 4.) Moreover, to the extent that petitioners argue that the court’s findings lack evidentiary support, they fail to support such assertion with the required detailed and balanced recitation of the evidence presented at trial. (See *Nwosu v.*

Uba (2004) 122 Cal.App.4th 1229, 1246 (*Nwosu*) [“an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent”].)

Notwithstanding the lack of development of petitioners’ challenges to the court’s findings concerning the breach of fiduciary duty claims that might result in the conclusion that the appellate claims are forfeited, we will address below the claims we believe petitioners to be asserting.

D. *Pleaded Claims*

Petitioners argue conclusorily that “the trial court erred in denying [their] petition for recovery of trust funds.” They argue that there were “[u]naccounted loans for Brian Gill [that] amounted to \$7,000” and repeat this assertion that he improperly diverted funds to himself. And petitioners assert that Brian acted improperly in retaining his wife to work on the Project “at an undisclosed cost of \$121,872.” As discussed below, petitioners’ apparent challenges to the court’s rejection of their claims for reimbursement of diverted trust funds and excessive payments made to Kim are without merit.

1. *Compensation Paid to Kim Gill*

a. *Evidence*

The Pebble Beach Project involved a 75-year-old Mediterranean-style home in which Brian, petitioners, and their siblings had grown up. Under the terms of the trust instrument, the trustor’s widow, Elizabeth Gill—who is the stepmother of petitioners, Brian, Storm Gill and David Gill II, and is the mother of the trustor’s daughter, Constance—was granted a life estate in the home. She was entitled to exclusive possession of the home and was responsible for all of its expenses, including taxes, maintenance, and necessary repairs. Elizabeth remarried after the trustor’s death and moved out of the Pebble Beach home. It was vacant for various periods of time, although

Elizabeth on occasion allowed certain persons, including her son-in-law, to live in the home on occasion.

Around late 2005, Brian became aware that Elizabeth had allowed the property to become seriously dilapidated. The house had significant termite, dry rot and water damage, and problems with mold, asbestos, roofing, and plumbing. Because Elizabeth wanted to be relieved of the ongoing responsibility for the property, Brian negotiated an agreement under which she relinquished her interest in the home in exchange for the trust's relieving her of further obligations concerning the property, including any duty to repair it. Once Brian had worked out this agreement with Elizabeth (executed at a later time), he and his wife developed a plan for its sale. The home was unsalable in its existing dilapidated condition. Because the trust could not qualify for a loan, Kim suggested that she and Brian borrow the money, lend it to the trust, remodel the home, and sell it for a profit that would benefit each of the siblings.

Brian, petitioners, and the other brothers (Storm and David) met in March 2006 at Brian's Pacific Grove office. Kim was present for part of the meeting. After a tour of the Pebble Beach house, they discussed the potential renovation and sale of the Pebble Beach property. Brian estimated that minimal remediation work that would make the house habitable would cost \$100,000 and might yield a sale in the range of \$1.2 million and \$1.5 million. He estimated that, alternatively, if more extensive remodeling of the house were done, the house might be sold for between \$2 million and \$3 million. Brian said that because he and Kim would need to borrow money personally to fund the repairs, they wanted to have control over the Project, with Kim devoting her time as the designer

and project manager. She indicated that she would charge the trust for her time at \$100 per hour, \$25 lower than her ordinary hourly rate.⁸

The Project proceeded in 2006, with Brian and Kim obtaining a personal line of credit of \$500,000 to fund the remodeling; they passed on the benefit of this loan to the trust without charging interest. Kim performed design work, including a redesign of the kitchen, five bathrooms, and landscaping. She also served as project manager, selecting contractors, providing daily oversight of the work, and buying materials at her discounted rates without mark-up to the trust. After completion of the remodel—which was complicated by major storm damage occurring while the work was progressing that resulted in much duplication of work—Kim provided significant work in marketing, staging, and showing the property for sale. The Pebble Beach home was sold in October 2007 in an all-cash transaction for \$2,705,000. Each of the remainder beneficiaries—with the exception of Storm, who received a one-half share—received a distribution of approximately \$280,000 as proceeds from the sale.

Prior to the distribution to the remainder beneficiaries, over the objection of his brothers, Brian paid to Kim from the proceeds of the sale \$93,872, the sum she had invoiced for her services. (Brian had previously paid her \$28,000 in fees, plus reimbursement of about \$3,300 in costs.) Kim's invoice showed that between January 2006 to October 2007, she had worked a total of 1,545 hours. She reduced the hourly rate for some of her work to \$40 and did not charge for some of the work; the total savings to the trust for work charged at a discounted rate or not charged at all was

⁸ Storm, Jason, and David (through his deposition) testified that there was no discussion during the meeting that Kim would charge \$100 an hour for her services. Although Jonathan initially so testified at trial, he was later impeached with his deposition testimony in which he testified that Brian and Kim said that she would charge \$100 an hour for her design work.

approximately \$33,000. Brian felt that Kim's fees were reasonable. He believe that she had in fact undercharged for her services and the trust had received great value from Kim's work. Brian testified that because of the various roles Kim played, she "saved [the trust] so much money." The trust also received the benefit of Kim's agreement—one not available from other interior designers or project managers—to defer payment of the majority of her fees until the property was sold.

Kim, a licensed interior designer with approximately 15 years' experience, performed design work, as well as project management and property management for various residential properties. She ordinarily charged \$100 to \$125 an hour.⁹ Brian's expert Paula McChesney a licensed interior designer and project manager opined that Kim's fees were well below those that she reasonably could have charged, given the "enormous amount of work that she did," the level of expertise that she provided to the project, and the extent of the discounts that she passed on to the trust. McChesney concluded that "the trust received a great deal more value than [Kim] charged."¹⁰

b. *Discussion*

The court concluded that the record did "not support the finding of a specific agreement as to the rate of Kim's compensation. Absent such an agreement, she is entitled to receive reasonable compensation for the work and services she performed." The Project was no small endeavor, and the undisputed evidence was Kim devoted over 1,500 hours of her time to it from February 2006 to October 2007. The court concluded from the evidence that Kim "functioned as the project manager and designer. . . . She

⁹ Jason indicated in an e-mail introduced at trial that \$100 an hour, based upon his research, "may be about right for the designer stuff."

¹⁰ Petitioners' expert general contractor opined that Kim should have been paid a total of about \$12,000 for her work. Petitioners' other expert, an estate manager, testified that approximately \$40,000 would have been a reasonable charge for Kim's services.

transformed a derelict house into a beautiful, upscale Pebble Beach home that was featured in various home design periodicals. She was active in its staging and marketing. Largely due to her efforts, the house, which was initially in nearly a ‘tear down’ condition[,] sold for \$2,705,000 at a time when the real estate market was in a downturn.” Based upon these findings, the court concluded that “[t]he more convincing evidence presented supported the claim that \$100/hour is reasonable for the work performed” and that Kim actually charged only \$40 an hour for a significant part of her work.

There was substantial evidence supporting the court’s findings that Kim’s work from early 2006 to October 2007 greatly benefited the trust and her fees of \$121,872 were reasonable. To the extent that petitioners’ challenge suggests there was a lack of evidentiary basis for the court’s determination that Kim’s fees were reasonable—a challenge which petitioners have nonetheless forfeited because they have neither clearly made it nor supported it with argument including a recitation of the relevant evidence both supporting and opposing their position (*Nwosu, supra*, 122 Cal.App.4th at p. 1246)—that claim clearly lacks merit.

Petitioners also infer that the court erred because Brian hired Kim for the Project, and thus “favor[ed] his wife with money without the knowledge or consent of the beneficiaries.” The court addressed this argument in its statement of decision, concluding that under the trust agreement, Brian, as trustee, was authorized “to manage, control, sell, improve and/or repair [t]rust property, and that consent of the beneficiaries [to retain Kim] was not required.” The trust agreement so provides this authority to the trustee.¹¹

¹¹ The trust provides, under article V, dealing with the trustee’s administrative powers, that “the Trustee shall have the following powers in addition to those now or hereafter granted by law. [¶] . . . [¶] 5.05 **Power to Sell, Exchange, or Repair.** To manage, control, grant options on, sell (for cash or on deferred payments[]), convey, exchange, partition, divide, improve, and repair trust property.”

The court held further that the trust was not harmed, but “to the contrary . . . [was] greatly benefited from the services provided by Kim Gill.” Additionally, the court found—implying that the better practice, given the potential conflict of interest, would have been for Brian to have obtained the beneficiaries’ formal consent to Kim’s hiring—“that in employing and paying Kim Gill as he did, [Brian] acted reasonably and in good faith” under sections 16440(b) and 16441(b).¹²

It was undisputed that Brian and Kim placed their personal assets at risk by obtaining a \$500,000 loan in order to fund the project, and that they gave the trust the benefit of this loan without charging interest. Kim was an experienced interior designer. She did not charge the trust customary markups for hired contractors; gave the trust the benefit of her ability to purchase materials at discounts; reduced her hourly rate for a portion of her services and did not charge at all for some of those services; and deferred most of her compensation until the Project was completed and the property was sold. Indeed, there was significant evidence suggesting that the remodeling Pebble Beach Project—with the attendant successful sale and substantial distributions to the beneficiaries—would have been impossible without Brian’s and Kim’s personal, interest-free, loan to the trust and the savings to the trust resulting from Kim’s hiring. Thus, from our review of the record, we find no abuse of discretion in the trial court’s finding that Brian acted reasonably and in good faith within the meaning of sections 16440(b) and 16441(b). Accordingly, there is no basis for petitioners’ contention that the court erred in rejecting their claim that Brian breached his fiduciary duties to the trust by paying an

¹² In its statement of decision, the court repeatedly found that Brian acted reasonably and in good faith, in each instance following that finding with a reference to “California Code of Civil Procedure, § 16440(b) and § 16441(b) [*sic*].” Sections 16440 and 16441 do not exist under the Code of Civil Procedure, and it is obvious that these references are to sections of the Probate Code.

unreasonable sum to his wife for her services or by failing to obtain the beneficiaries' formal consent to her hiring.¹³

2. *Trust Payments to Brian Gill or for his Benefit*

a. *Evidence*

Petitioners argue generally that the court erred in concluding that Brian should not be compelled to return alleged “missing funds traced to his own hands.” Although petitioners alleged in the petition that Brian diverted trust funds to himself totaling of \$55,416.16, they withdrew many of the claims at trial, thereby reducing the amount in controversy to the principal sum of \$24,748.66. In the first category—unexplained payments—there were (after withdrawal of one challenged payment) five payments totaling \$12,425. Brian introduced testimony specifically addressing at least two of these payments, indicating that he had located invoices for legal services he had provided to the trust that corresponded with the payments.

In the second category of challenged payments, there were four undocumented loan payments totaling \$7,000. Brian testified that one payment for \$2,000—for which there was an accounting entry of “BFG Loan”—was actually for trustee or attorney fees, and the unaudited journal entry was erroneous and was later corrected. He also testified

¹³ As a related matter, petitioners also argue serially that Brian breached his fiduciary duties by allegedly advocating “under the guise of a professional legal opinion” the soundness of Kim’s claim that she was entitled to full payment. The court rejected this argument in its statement of decision, and found further that Brian acted reasonably and in good faith within the meaning of sections 16440(b) and 16441(b). Because the court found that Kim’s fees were reasonable, and since it may be reasonably inferred that Brian was attempting to avoid costly litigation to the trust in recommending that the trust pay Kim, the court did not abuse its discretion in concluding that Brian acted reasonably and in good faith.

that two other payments totaling \$3,000 were loans that he repaid. Brian testified further that it was his common practice to provide loans from the trust to the beneficiaries, including the two brothers who were attorneys (Jonathan and David), and that oftentimes the smaller loans were made without promissory notes or the payment of interest. This practice was one that also existed while the beneficiaries' father, the trustor, was alive.¹⁴

The third category alleged in the petition involved three payments from the trust for Brian's personal expenses, totaling \$1,823.66. Petitioners introduced evidence concerning only one of these payments—a 1996 campaign contribution of \$500 to a candidate for supervisor. Brian explained that this contribution was an appropriate trust expense. The candidate was a prominent real estate broker, and because the trust owned various undeveloped property in Sand City and Pebble Beach, Brian believed it would be beneficial to the trust if someone knowledgeable in the real estate field were elected to the board of supervisors.

The last category concerned allegedly improper payments to Brian categorized as being for legal fees in which there were no corresponding invoices. Although there were originally 16 such questioned payments, totaling \$26,667.50, petitioners' counsel stipulated at trial to the removal of all but two of them; this stipulation reduced the principal amount of the claim to \$3,500. The two payments, from 1994 and 1996, were apparently for fees; Jonathan testified that because it was unclear from the accounting records whether the payments were for trustee fees or legal fees, he included them in the claim.

¹⁴ Brian introduced into evidence a summary he had prepared of the loans made by the trust to other beneficiaries; many of the loans had been made without promissory notes or the charging of interest, and some of the loans had not been repaid.

In addition to responding to many of the specific questioned payments, Brian offered more general testimony concerning the work he performed for the trust and the fees he charged for those services. This work ranged from what might be considered ordinary trustee work (e.g., collecting receipts, property management, paying bills, banking, and preparing summaries provided to accountants for annual tax returns) to extraordinary trustee services or attorney work (e.g., marshalling and evaluation of all trust assets for initial tax return, tenant evictions, handling 1031 real property exchanges, legal work for real property sales, attendance and participation at various public agency meetings, addressing water drainage and boundary disputes, and handling environmental issues for Sand City lots located in a sensitive habitat). Brian testified that he worked hundreds of hours each year on behalf of the trust, either in the role of trustee or attorney. He did not bill the trust for much of the legal work he performed and did not charge for all of his trustee work because the trust involved his own family. Over the course of more than 17 years, Brian received \$123,277 in combined trustee/attorney fees. This averaged out to \$7,251 in fees per year, or about 29 hours per year at Brian's hourly attorney rate. According to Brian's expert, Albert Nicora (a trusts and estates attorney and probate referee), a standard annual trustee fee would have been one percent of the trust's corpus, or at least \$30,000 (or \$510,000 for 17 years).¹⁵ Nicora testified that this figure did not include extraordinary trustee fees for unusual trustee work or attorney fees for legal work done on behalf of the trust.

Nicora also opined, based upon all of the trust files he reviewed, that Brian had met his fiduciary responsibilities as trustee and attorney for the trust. Nicora testified that he was satisfied from his review of the questioned payments alleged in the petition that

¹⁵ Jonathan, an attorney, concurred with Nicora that reasonable trustee fees for a trust with the assets involved here would be roughly \$30,000 per year.

loans to Brian “had been paid or there had been an adjustment made on something,” such as a discount of fees. He also testified that, in part because some of the entries to the trust accounting records were made by clerical personnel employed by Brian, “[o]ver 17 years it’s inconceivable that there wouldn’t be a few [accounting errors] in this case.”

b. *Discussion*

The court concluded that it “[did] not find evidence to support the claim that Brian Gill took trust funds to which he was not entitled during his seventeen years of his trust administration. In fact, the evidence establishes that during that period the fees he took were far less than he was entitled to claim.” The court also found Brian’s explanation as to two questioned payments “to be credible.”

Assuming petitioners’ argument to be that there was no substantial evidence to support the court’s conclusion—again, a challenge that was forfeited because it was neither clearly made nor with citation to the relevant evidence (*Nwosu, supra*, 122 Cal.App.4th at p. 1246)—it is without merit. The court heard extensive evidence concerning the alleged improper payments, including Brian’s testimony regarding his administration of the trust and specifically about many of the questioned payments; it found Brian’s testimony to be credible. (See *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622 [credibility is an issue of fact for resolution by trial court].) In addition, there was testimony from Nicora, Brian’s expert, that Brian met his fiduciary responsibilities to the trust and that all loans made by the trust to Brian were accounted for and either repaid or satisfied through other adjustments.

The court found that the making of smaller loans to the beneficiaries, including Brian, involved “some minimal informalities . . . reflecting a continuation of the practices of their father during his lifetime[, which] was done for the benefit of the beneficiaries and with their acquiescence.” It concluded further: “Although the loans were made contrary to the technical terms of the [t]rust, the Court finds that in making such loans

[Brian], as Trustee, acted reasonably and in good faith and the Court therefore excuses [Brian] from liability for any technical breach of the [t]rust” pursuant to sections 16440 (b) and 16441(b).

The court had before it evidence refuting specific questioned payments and showing that the practice of making loans to beneficiaries informally did not favor Brian over other beneficiaries. And the court considered Nicora’s testimony that minor accounting errors were to be expected, and that overall, the trust benefited greatly from Brian having charged less than one-quarter of the fees he reasonably could have charged over 17 years of administering the trust.¹⁶ From the record, we readily conclude that the court did not abuse its discretion in excusing “any technical breach of the [t]rust.” (§§ 16440(b), 16441(b).)

3. *Other Claimed Breaches of Fiduciary Duty*

In addition to the claims in the petition, petitioners raise on appeal several other breach of fiduciary duty claims, arguing that the court erred in rejecting these unpleaded claims. We understand these additional claims against Brian to be that he (1) threatened Elizabeth in an effort to obtain her agreement to relinquish her life estate interest in the Pebble Beach property; (2) sought to terminate the interest of his half-sister, Constance,

¹⁶ Petitioners argue that the court erred in permitting Brian to assert the uncharged fees he effectively waived as a setoff from the damages he caused the trust. This claim is without merit. The court did not consider any fees that Brian could have charged the trust as a means of offsetting any claims asserted by petitioners against him. Rather, it simply considered the uncharged fees in the context of determining whether it should exercise its discretion, under sections 16440(b) and 16441(b), to relieve Brian of liability for any technical breaches of the trust instrument by finding that he had acted reasonably and in good faith. It was of course within the court’s discretion to consider the benefit the trust received over the years as a result of Brian forgoing substantial fees that he could have otherwise charged the trust.

in the trust; (3) demanded a release of liability as a condition to making distributions to the beneficiaries; and (4) failed to turn over all trust accounting records.¹⁷

None of these claims was alleged in the petition as a ground for affirmative relief. As noted above, the relief sought in the petition was limited to claims that Brian improperly paid himself \$55,416 from the trust and overpaid Kim by \$75,000 for services she provided to the trust. Nowhere in the petition is there a claim of breach of fiduciary duty based upon the other matters raised in petitioners' appeal. And the case proceeded to trial on only the pleaded claims, petitioners' counsel noting on several occasions that his clients were only seeking relief as alleged in the petition. To the extent that petitioners assert here that the court erred by denying relief in connection with these unpleaded claims, any such assertion is forfeited. (See *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn 9 [appellant may not raise new theory of liability on appeal]; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 623 ["appellant cannot challenge a judgment on the basis of a new cause of action it did not advance below"].)

We perceive that petitioners cite these unpleaded matters as reasons the court allegedly abused its discretion in finding that Brian acted reasonably and in good faith under sections 16440(b) and 16441(b). Since the court's decision did address these matters, we will address them in the context of petitioners' claim that it abused its discretion.

Petitioners contend that Brian acted improperly by "threaten[ing] the income beneficiary, [Elizabeth], and took her life estate to create work for his wife and a

¹⁷ Petitioners also claim that Brian breached his fiduciary duty by advocating Kim's legal position regarding her claim against the trust for compensation to the beneficiaries, a contention we have already addressed (see fn. 13, *ante*).

liquidation of Elizabeth’s home.” Brian testified that he did not coerce Elizabeth into relinquishing her interest in the Pebble Beach property. Rather, she herself wanted to be relieved of the financial burden related to that property, and she obtained a substantial benefit—namely, the trust’s release of her responsibility to repair the severely dilapidated home—in exchange for relinquishing her interest in the property. Further, there was evidence that prior to the March 2006 meeting among the five male beneficiaries in which the Project was discussed, Jonathan created a meeting agenda in which one of the stated goals was “[h]aving [Eliza]beth exit the [t]rust.” And the agreement was of benefit to the trust and the remainder beneficiaries, each of whom profited significantly from the ultimate sale of the home after its renovation.

In their appellate briefs, petitioners argue that Brian breached his fiduciary duty by “[seeking] to terminate the beneficial interest of his sister[,] Constance Gill.” In the agenda for the March 2006 meeting of the five brothers, there was a reference to Constance under the heading “Disclaimers.” Brian testified that his brothers, Jonathan and David, suggested that obtaining a disclaimer of the trust from Constance “was an avenue that we should pursue,” but that the five brothers at the meeting unanimously abandoned the issue.¹⁸ In its statement of decision, the court addressed this issue—raised by petitioners in their request for statement of decision—by finding that Constance “was not excluded from any [t]rust activity, . . . she suffered no harm from any [t]rust activity or omission[, and she] . . . received the same distributions as the other beneficiaries.” In addition, the court found that Brian acted reasonably and in good faith pursuant to sections 16440(b) and 16441(b). The evidence was undisputed that—regardless of the

¹⁸ Storm Gill testified that at the March 2006 meeting, Brian suggested that Elizabeth and Constance be excluded from participating in any profits realized from the Pebble Beach Project, but that Storm and his three other brothers immediately rejected Brian’s suggestion.

factual dispute over who had initially proposed the exclusion of Constance from the trust—no action was taken toward Constance and she participated fully in all trust distributions.

Petitioners also urge that Brian breached his fiduciary duty by demanding that the beneficiaries release him from liability as a condition to distributing funds to them. Jonathan testified that after the Pebble Beach property sold and Brian's brothers objected to his paying Kim for her services, Brian sent an e-mail to Storm on or about October 17, 2007; Jonathan characterized the e-mail's import to be that Brian "was going to hold any distributions hostage unless [the brothers] basically agreed to accede to Kim Gill's payment." And Jonathan testified that he understood from an e-mail Brian sent on or about the same date that "Brian was asking us to relieve him from any acts or misacts he may have taken while trustee That he was saying, okay, we'll cut a deal. But you have to cut me loose from everything." Brian testified that as a result of receiving multiple threats from his brothers that he would be sued if he paid Kim, he "was attempting to get an entire closure to all the matters [related to the Pebble Beach Project] so we could disburse the money and walk away." He was attempting to avoid litigation fees to all concerned.

The court concluded that "the [t]rust suffered [no] harm from [Brian's] request for a release of liability from the claims of Petitioners and, in light of the persistent and repeated threat of litigation by petitioners, . . . [and] in making the request for a release of liability[, Brian] acted reasonably and in good faith" under sections 16440(b) and 16441(b). The record showed that as a result of the dispute with his brothers concerning the proposed payment of Kim's compensation, Brian requested a release of liability before making distributions to the beneficiaries. Although a trustee is prohibited under the Probate Code from conditioning a distribution or payment to a beneficiary upon a beneficiary's release of him or her (§ 16004.5, subd. (a); see also *Bellows v. Bellows*

(2011) 196 Cal.App.4th 505, 510),¹⁹ it is apparent that Brian was responding to multiple threats of litigation. Jonathan wrote Brian that paying Kim “will guarantee a lawsuit.” Brian testified (without contradiction)²⁰ that Jason also threatened that he would ruin Brian’s career if he paid Kim. And shortly after seeking a resolution of the matter before paying Kim and making the distributions, Brian in fact paid Kim in full and distributed the profits from the Project to the six beneficiaries. Under the circumstances, therefore, the court did not abuse its discretion by concluding that the trust was not harmed by Brian’s actions and by finding that he acted reasonably and in good faith. (§§ 16440(b) and 16441(b).)

Lastly, petitioners contend that the court erred in rejecting their assertion that Brian improperly withheld accounting records from the trust after he withdrew as trustee. They argue that Brian, notwithstanding his statements to the contrary, failed to turn over all accounting records to petitioners, and specifically withheld electronic Quicken records that he had used while he was trustee. In February 2008, after Brian resigned as trustee, and in response to requests by Jonathan, Brian delivered to petitioners the accounting records for the trust, consisting of approximately eight boxes of documents. The records included handwritten ledgers, unaudited records, and final ledgers. Brian did not retain copies of most of the trust records he produced.²¹ Brian testified that after the petition

¹⁹ “A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument.” (§ 16004.5, subd. (a).) Subdivision (b) adds, “This section may not be construed as affecting the trustee’s right to: [¶] . . . [¶] (2) Seek a voluntary release or discharge of a trustee’s liability from the beneficiary.”

²⁰ Jason testified in the rebuttal phase of the trial, but did not refute that he threatened Brian’s career over his proposed action of paying Kim.

²¹ After Brian produced these accounting records and five months before filing the instant petition, Jonathan and Jason, as successor cotrustees, filed a petition to recover all

(continued)

was filed and he began looking for documents to support trust payments to him for legal fees, he located two backup invoices on old computer disks; hard copies of the invoices were supplied to petitioners' counsel. The computer disks, which dated back to 1996, included electronic information concerning over 150 of Brian's clients besides the trust.

In closing argument below, petitioners' counsel asserted that Brian had kept "two sets of books" and had failed to produce his electronic Quicken records to petitioners after resigning as trustee. Brian's counsel responded to these claims, arguing that they were without foundation. The court rejected petitioners' argument, finding that Brian "did not withhold electronic accounting records from the Petitioners, [and] that [Brian] did provide all accounting ledgers of the [t]rust's accounts in hard/paper form." It also concluded that Brian acted reasonably and in good faith under sections 16440(b) and 16441 (b).

Regardless of whether there may have been some evidence supporting petitioners' claim that Brian kept "two sets of books," the court implicitly rejected that claim, finding that Brian's testimony explaining "minor ledger errors" to have been credible. And in concluding that Brian did not withhold electronic accounting ledgers from petitioners, the court implicitly found credible Brian's explanation that the Quicken electronic records contained the records of over 150 of his clients, and were therefore not trust records that he was obliged to produce. Moreover, we conclude from a review of the record that the court did not abuse its discretion by finding, in connection with this records production

trust records and property in Brian's possession. They alleged that despite a demand, they had not yet received all of the trust records and property from Brian. Brian opposed the petition, asserting, inter alia, that no relief was needed because he had already turned over all trust records and property to the co-trustees. After hearing, the court issued an order requiring Brian to turn over trust records. Petitioners do not seek relief from this order.

issue, that even if Brian's actions fell short of his meeting his fiduciary duties as trustee, he acted reasonably and in good faith and was thus entitled to relief from any technical failing under sections 16440(b) and 16441(b).²²

We thus conclude that the four unpleaded claims discussed above, singly or collectively, do not support petitioners' claim that the court abused its discretion. The court could have properly found, based upon the totality of the evidence presented, that to the extent any action taken by Brian as trustee may have constituted a technical breach of fiduciary duty, he acted reasonably and in good faith and was thus entitled to relief from any such failing under sections 16440(b) and 16441(b). Those code sections afford the court broad discretion to grant a trustee relief under circumstances, such as the case here, where the individual has acted in a fiduciary capacity over a long period of time and the court determines that the actions taken, while imperfect, have nonetheless been

²² We observe that *after* entry of judgment in this matter, petitioners filed a new petition for an order requiring Brian to deliver electronic Quicken files, claiming that they were trust records that should have been produced in response to prior requests. Brian opposed the petition, arguing that the electronic records were not property of the trust but instead were records belonging to Brian's business and were protected from disclosure by the attorney-client privilege. The court indicated in a minute order from a hearing in October 2010 that it had requested further declarations and briefing. We are also aware, based upon records received from Brian as a result of his petition to augment the record that we granted, that Brian filed supplemental opposition below reiterating that the electronic records contained privileged information of Brian's other clients. The court ruled in November 2010 that the granting of petitioners' motion would likely violate the attorney-client privilege; it instead ordered Brian to produce any trust records in hard copy form stored in electronic format which were not previously produced. This appeal does not include review of any postjudgment orders entered by the court relating to the production of trust records; to the extent that petitioners' claim here purports to challenge any postjudgment order, we will disregard it. (*In re Marriage of Folb* (1975) 53 Cal.App.3d 862, 877 ["matters occurring after judgment are generally not reviewable on appeal"], disapproved on other grounds in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 749.)

reasonable and performed in good faith. Moreover, as the determination of the appropriate relief in a trust dispute such as the one presented here is exclusively a matter in equity (§ 16421), the relief afforded by the trial court, including its decision to exercise its broad discretion under section 16640(b) and 16441(b), is generally a matter left to the trial court for determination. (*Rivero v. Thomas* (1948) 86 Cal.App.2d 225, 238.)

II. *Award of Attorney Fees and Costs*

A. *Background*

After the court rendered its tentative decision, Brian filed a motion for order awarding attorney fees and costs incurred in the proceedings. He argued that he had successfully defended against claims made against him in his capacity as a former trustee and that it would be inequitable for him to shoulder the financial burden of that defense. Brian claimed that he was entitled to fees and costs under alternative legal theories that (1) he was the prevailing party entitled to costs under Code of Civil Procedure section 1032, and (2) he successfully defended his actions as trustee and was thus entitled to recover his attorney fees (*Estate of Beach* (1975) 15 Cal.3d 623; *Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229 (*Kasperbauer*).) He sought an order awarding him about \$305,000 in attorney fees and costs (about \$293,000 and \$12,000, respectively).

Petitioners opposed the motion. After a hearing, the court granted Brian's motion. It held that 70 percent of the amount of attorney fees and costs claimed by Brian was reasonable and therefore awarded Brian the total sum of \$213,274.18.

B. *Applicable Law and Standard of Review*

As one court has explained, "[T]he Probate Code is studded with provisions authorizing the trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration. For example, section 16247 empowers the trustee 'to hire persons, including . . . attorneys . . . or other agents . . . to advise or assist the trustee in the performance of administrative duties.' Section 16243 provides, 'The trustee has

the power to pay . . . reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the . . . administration . . . and protection of the trust.’ And section 15684, subdivision (a) provides in part, ‘A trustee is entitled to the repayment out of the trust property for . . . [¶] [e]xpenditures that were properly incurred in the administration of the trust. . . .’ ” (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97.)

Courts have authorized the award of attorney fees incurred by fiduciaries (executors and trustees) in litigation challenging their actions in a variety of circumstances. For example, *Estate of Beach, supra*, 15 Cal.3d at page 629, involved an estate in which most of the assets were placed into a testamentary trust. Three of the four residuary trust beneficiaries filed a contest of the first account of the Bank of California, executor of the estate and trustee of the trust, claiming that the bank was negligent in failing to sell estate assets (stock) before a significant decline in its market value. (*Ibid.*) After the bank prevailed, the contestants challenged on appeal, among other things, a postjudgment award of the bank’s attorney fees in defending the contest. (*Id.* at p. 630.) The high court rejected the contestants’ assertion that the executor should have borne the legal cost in defending the challenge to the accounting because the defense was for the benefit of the executor, not the estate: “The expenditures were for the purpose of protecting the executor from unjust surcharge for conduct in the administration of the estate which the present proceeding has determined to have been perfectly proper. Such expenditures for an executor’s or administrator’s successful defense against exceptions to his account are chargeable against the estate. [Citation.]” (*Id.* at p. 644.)

Similarly, in *Estate of Cassity* (1980) 106 Cal.App.3d 569, 571, the beneficiary attempted to reopen five prior accountings and objected to three pending accountings of a trustee. She was unsuccessful for the most part; the surcharges against the trustee imposed by the court represented “but a small percentage of the total sought by the

beneficiary.” (*Id.* at p. 574.) The appellate court held that, while it was proper to deny the trustee his compensation and attorney fees for defending the claims that resulted in surcharges, it could not deny such compensation and fees in toto, because “[a] considerable portion of the trustee’s efforts and expenditures must necessarily have been for the purpose of protecting himself from unjust surcharge for conduct in administering the trust which the court’s findings . . . determined were perfectly proper. Such efforts and expenditures in the trustee’s successful defense are chargeable against the trust estate. [Citation.]” (*Ibid.*)

In *Hollaway v. Edwards*, *supra*, 68 Cal.App.4th at page 96, the court awarded attorney fees in favor of a cotrustee who successfully defended a petition for removal in which it was alleged that the cotrustee had wrongfully obtained and withheld trust property. In affirming the order, the court rejected the claim that at least a portion of the fees were not recoverable because they were related to charges that the cotrustee wrongfully obtained or withheld property and therefore the order benefited her personally: “These charges were part of [the] removal petition and alleged wrongdoing by Hollaway pertaining to the trust. While defense against those allegations may have benefited Hollaway personally by eliminating the possibility of individual liability, they also benefited the trust by eliminating charges raising serious questions about whether she had and could continue to administer the trust properly. [Citation.]” (*Id.* at p. 99.)

And in *Kasperbauer*, *supra*, 171 Cal.App.4th at page 232, the trust beneficiaries filed companion petitions to remove the trustee, to order him to prepare an accounting, and to surcharge him for funds withdrawn from the trust. The appellate court rejected the beneficiaries’ challenge that the court had abused its discretion by awarding pendent lite attorney fees payable by the trust for the trustee’s preparing and defending the accounting: “Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid from trust assets. Preparing the accounting and responding to the

beneficiaries' objections to that accounting are aspects of trust administration.” (*Id.* at p. 235.) The court rejected further the beneficiaries' claim that the trustee's subsequent discharge precluded him from recovering attorney fees: “Appellants' argument that Trust assets may not be used to compensate a trustee's attorneys after the trustee is discharged also is without merit. Section 15644 states in part: ‘A trustee who has resigned . . . has the powers reasonably necessary under the circumstances . . . to complete the resigning or removed trustee's administration of the trust.’ . . .” (*Ibid.*)

In reviewing an award of attorney fees, we determine whether the court's ruling constituted an abuse of discretion. (*Kasperbauer, supra*, 171 Cal.App.4th at p. 234; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461.) “A court sitting in equity is vested with wide discretion in awarding counsel fees for services to a trust and its findings will not be disturbed in the absence of a showing of a palpable abuse of such discretion. [Citations.]” (*In re Vokal's Estate* (1953) 121 Cal.App.2d 252, 260-261; see also *Hollaway v. Edwards, supra*, 68 Cal.App.4th at p. 99 [probate court has broad discretion both to decide whether attorney fees should be awarded and the identity of the payor of such fees].) Petitioners admit that the fee order challenged here will not be disturbed absent a finding that the court abused its discretion.

C. Discussion

As noted, a trustee who successfully defends himself or herself against claims based upon alleged breaches of fiduciary duty is entitled to recover his or her reasonable attorney fees. The rationale for this rule is that responding to claims of improper conduct in the performance of a trustee's duties to the trust is effectively a challenge to his or her administration of the trust. (*Kasperbauer, supra*, 171 Cal.App.4th at p. 235; *Estate of Cassity, supra*, 106 Cal.App.3d at p. 574) Further, a trustee's right to recovery of attorney fees is neither limited procedurally to the defense of surcharge claims (see, e.g., *Hollaway v. Edwards, supra*, 68 Cal.App.4th at p. 96 [fees awarded for successful

defense of removal petition]), nor temporally to claims asserted while the fiduciary is still the acting trustee (*Kasperbauer*, at p. 235).

In this instance, it is clear that Brian's response to the claims asserted in the petition consisted of a defense to actions taken by him in the administration of the trust. Petitioners' claim that Brian paid unreasonable compensation to his wife, Kim—consisting of significant evidence about the Project generally and the services Kim provided in particular—involved substantial testimony, including the testimony of four expert witnesses. The testimony consumed hundreds of pages of the reporter's transcript, and included the introduction of voluminous exhibits. The ultimate question of whether Brian breached his fiduciary duty by paying Kim unreasonable fees was obviously one involving a challenge to his administration of the trust. The second component of petitioners' claim—alleged unauthorized payments made by Brian from the trust to himself—involved inquiries concerning his recordkeeping, tasks he performed, fees he charged, and fees he reasonably could have charged while he was trustee for more than 17 years. Brian's defense of this claim was also clearly a response to a challenge to his administration of the trust.

Further, the fact that Brian had already resigned as trustee at the time the claims concerning his prior administration of the trust were asserted and litigated is of no consequence to whether he should be entitled to reasonable attorney fees for successfully defending against them. (*Kasperbauer*, *supra*, 171 Cal.App.4th at p. 235.) As seen from the discussion above, the court has broad discretion in awarding fees to a fiduciary who successfully defends against claims for breach of trust. A rule barring recovery of attorney fees because the trial of the claim occurs after the fiduciary's role has ceased would be an arbitrary one. Moreover, the fact that the claims here did not arise in response to an accounting by a former trustee is likewise a procedural matter irrelevant to

the fiduciary's right to seek recovery of fees after successfully defending his actions as a trustee.

Petitioners contend that the court “applied the wrong test and standard” in granting Brian’s motion for attorney fees and costs. They argue that the litigation expense Brian incurred in defending against the claims alleged in the petition benefited him personally, and did not benefit the trust. We disagree. The standard for the court to exercise its discretion in granting a trustee recovery of attorney fees in trust litigation is not so narrowly defined as is urged by petitioners. The critical inquiry is whether the trustee has successfully defended against claims that involve his or her administration of the trust. Where a trustee prevails in rebuffing challenges to the administration of the trust, the trust is benefited, notwithstanding the fact that the trustee also benefits by being saved the personal expense of reimbursing the trust any sums claimed owing as a result of his or her alleged trust mismanagement. (See *Holloway v. Edwards*, *supra*, 68 Cal.App.4th at p. 99.)

Terry v. Conlan, *supra*, 131 Cal.App.4th 1445, relied on by petitioners, is not controlling. There, the circumstances under which this court held that the trustee was not entitled to reimbursement of attorney fees were very different. Because the dispute there involved competing heirs to an estate (adult children, on the one hand, and the trustor’s widow, on the other hand) and was one “over who will enjoy the benefits and who will control the trust” (*id.* at p. 1462), we held that the trustee’s litigation expense was a benefit to her personally that was not recoverable from the trust (*id.* at p. 1464). *Terry* is obviously distinguishable from our case.

The claims in the petition involved challenges to Brian’s administration of the trust, challenges which he successfully defended. Under the authorities cited above, including but not limited to section 15684, subdivision (a), Brian, as the former trustee, was entitled to recover his attorney fees incurred in that defense, as “[e]xpenditures that

were properly incurred in the administration of the trust.” The court did not abuse its discretion in ordering that Brian recover his reasonable attorney fees and costs incurred in defending against those claims.²³

DISPOSITION

The judgment is affirmed.

Walsh, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

²³ Petitioners do not challenge the court’s determination that an amount equivalent to 70 percent of the fees and costs claimed in Brian’s motion constituted a reasonable sum. They do, however, cite *Donahue v. Donahue* (2010) 182 Cal.App.4th 259 in support of their contention that Brian was entitled to no attorney fees or costs. *Donahue*, in which the appellate court reversed a substantial fee award to a former trustee primarily because the trial court did not conduct a sufficient inquiry concerning the reasonableness of the award, is of no assistance to petitioners. Moreover, their failure to attack the reasonableness of the amount of fees and costs awarded to Brian here constitutes a forfeiture of that claim. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.)

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.